In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-895

VERA RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California in March 1971 petitioner and her husband, John Rivera, were convicted on nine counts of an indictment charging them with smuggling aliens into the United States in violation of 8 U.S.C. 1324.

On January 31, 1972, the district court denied petitioner's motion for a new trial, but granted her motion to be sentenced under the lesser included offense of aiding and abetting the illegal entry of aliens in violation of 8 U.S.C. 1325.[1] The district court, there-

[1] This statute provides for punishment of imprisonment for not more than six months and a fine of not more than $500 for a first offender, and subjects a subsequent offender to a harsher

upon sentenced petitioner to concurrent six-month terms of imprisonment on each of nine counts. After imposing sentence, the court advised petitioner of her right to appeal and petitioner waived an appeal.[2] Execution of the sentence was stayed for a period of three weeks. Thereafter, on February 24, following the filing of a motion to reduce the sentence, the court suspended the sentence and placed petitioner on probation for a period of three years.

On March 10, petitioner filed a request to file a late notice of appeal. On April 3, 1972, the district court denied the motion, and on April 14, 1972, petitioner filed a notice of appeal. On November 15, 1972, the court of appeals dismissed the appeal as untimely.

The dismissal of the appeal was clearly proper. Petitioner not only filed an untimely notice of appeal from the judgment of conviction, but also failed to file a timely notice from the order denying her leave to file a late appeal. As the court below found, the filing of a timely notice of appeal is jurisdictional. Rule 4(b) and 26(b) Fed. R. App. P. Nor does anything that petitioner asserts suggest excusable neglect.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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penalty. The felony statute, under which petitioner had been convicted, carries a penalty of imprisonment of not more than five years and a fine not exceeding $2,000 for each alien in respect to whom any violation occurs.

[2] At this proceeding the indictment against petitioner's husband, who had been committed for incompetency subsequent to the jury verdict, was dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1973